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Summary record of the 2230th meeting

Topic:
Law of the non-navigational uses of international watercourses

Extract from the Yearbook of the International Law Commission:-
1991, vol. I

what they had been able to accept was a non-discrimination clause in respect of remedies.

98. Since that difficult issue could not be resolved, the Drafting Committee had preferred to leave the decision to the plenary.

99. Mr. McCAFFREY (Special Rapporteur) said that the square brackets needed to be added to the French text of document A/CN.4/L.458.

100. Mr. CALERO RODRIGUES said that, in his view, the article had what was a major flaw for a legal text: it was ambiguous. As the Chairman of the Drafting Committee had pointed out in his introduction, there were two possible interpretations of the article. It was either based on the premise that States were under an obligation to provide remedies to all victims in the case of transboundary harm resulting from watercourse activities, in accordance with the principle that adequate compensation was already an established rule of general international law, or it was based on the principle of non-discrimination between victims residing in the watercourse State and victims residing in other States. It seemed that it was the latter interpretation that the Special Rapporteur had originally had in mind in the draft of article 3 annexed to his sixth report, as indicated by paragraph 2 of his commentary relating to the obligation to provide compensation or other relief ("Persons threatened with harm in the second State should be entitled, to the same extent as persons in the first State . . ."). Moreover, in the draft commentary that he had had circulated informally[9] the Special Rapporteur indicated that the article was:

> . . . addressed to the situation in which there is a remedy under the domestic law of the forum State for harm that originates and is sustained in that State, but in which there may be no remedy for harm that originates within its borders but is sustained extraterritorially.

101. Before adopting article 32, the Commission had to decide how it would be interpreted in order to remove any ambiguity. The Commission could not adopt a text on which it did not have a clear position. Since he did not have a specific proposal to offer at the current stage, he suggested that the article should be given further consideration. It might also be possible to combine articles 32 and 33, which enunciated substantive and procedural provisions in respect of remedies.

102. Mr. Sreenivasa RAO said that articles 32 and 33 had initially been included in the section on implementation (articles 3 and 2, respectively), which the members of the Commission had considered unacceptable on many counts. At the time the two articles had been sent to the Drafting Committee, there had been not only the problem of ambiguity, as stressed by Mr. Calero Rodrigues, but also other problems. He personally feared that, if the Commission discussed the issue of remedies available to private parties, it would soon find itself in the realm of private international law, with all the resulting dangers of conflicts of laws. The question of remedies available to private parties was already dealt with in other texts and it might be asked whether it really belonged in a draft convention which would be basically a framework agreement designed to govern relations between States. He also did not think it reasonable to imagine that individuals or groups of individuals might, on the basis of that framework agreement, hamper bilateral or multilateral negotiations held by States with a view, for example, to regulating the management of natural resources. That was his main reservation with regard to articles 32 and 33.

103. Mr. BARSEGOV said that, as a member of the Drafting Committee, he had also expressed his disagreement with regard to article 32. In his opinion, the Commission could not adopt, as an integral part of the text, articles which had formerly been contained in an annex, did not belong in a framework agreement and were, in addition, unacceptable to watercourse States.

104. Mr. PAWLAK (Chairman of the Drafting Committee) said that the Drafting Committee had given lengthy consideration to article 32, which had originally been adopted and then called into question in the light of article 33. Those considerations had finally led the Drafting Committee to place the text of article 32 in square brackets. In view of the reservations that had been expressed and of the possible need to place greater emphasis on non-discrimination than on domestic remedies, he suggested that the Commission should come back to articles 32 and 33 at its next meeting.

105. Mr. McCAFFREY (Special Rapporteur) said that, although he had the impression that the substantive issues that arose in connection with watercourses were not very different from those dealt with in the United Nations Convention on the Law of the Sea, article 235, paragraph 2, of which was very similar to article 32, he agreed that it might be necessary to make the wording of article 32 clearer.

106. The CHAIRMAN, speaking as a member of the Commission, said that, although he had not been present when the Drafting Committee had adopted the text of draft articles 32 and 33, he too believed that those articles overlapped on various points and could be combined.

107. Speaking as Chairman, he suggested that the Commission should continue its consideration of the two articles at its next meeting.

It was so agreed.

The meeting rose at 1.05 p.m.

2230th MEETING

Wednesday, 26 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barboza, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues,

[9] This informal paper was never issued as an official document of the Commission.

Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

ARTICLE 29 (International watercourses and installations in time of armed conflict) (*concluded*)

1. Mr. PAWLAK (Chairman of the Drafting Committee) recalled that, at the previous meeting, discussion on the article had been deferred as some members had felt that greater emphasis should be placed on the protection of watercourses in times of armed conflict. Of the many proposals made to meet that point, the simplest would be to reverse the two phrases in the original text of the article so as to refer first to the protection, and then to the use, of watercourses during armed conflict. The article, as reworded, would read:

> "International watercourses and related installations, facilities and other works shall enjoy the protection accorded by the principles and rules of international law applicable in international and internal armed conflict and shall not be used in violation of those principles and rules."

2. Mr. McCAFFREY (Special Rapporteur) said that the text read out by the Chairman of the Drafting Committee was, in his view, a definite improvement and probably stood the best chance of commanding general support. He would add that, although some members found it difficult to understand how a watercourse could be used in contravention of the rules and principles governing armed conflict, it was certainly a possibility.

3. Mr. NJENGA said that the new text made sense and safeguarded what had been achieved in the Drafting Committee. He trusted that the Commission would accept it.

4. Mr. BEESLEY said that he was among those who considered that the draft articles being prepared by the Commission should ultimately take the form of a framework convention and he very much hoped that any such convention would lay down residual rules. For that reason, he assumed that any residual rules which might eventually evolve out of the convention would provide broader protection, particularly for the environment, than the protection available under the principles and rules of international law applicable in international and internal armed conflict. On that basis, he could accept the proposed text.

5. The CHAIRMAN said that, in the absence of further comment, he would take it that the Commission agreed to adopt the amended text for article 29 read out by the Chairman of the Drafting Committee.

It was so agreed.

Article 29, as amended, was adopted.

ARTICLE 33 (Non-discrimination)

6. The CHAIRMAN invited the Chairman of the Drafting Committee to introduce the text proposed by the Drafting Committee for article 33, which read:

Article 33. Non-discrimination

Watercourse States shall not discriminate on the basis of nationality or residence in granting access to judicial and other procedures, in accordance with their legal systems, to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof.

7. Mr. PAWLAK (Chairman of the Drafting Committee) said that the article had been referred to the Drafting Committee as article 4 (Equal right of access), annexed to the Special Rapporteur's sixth report.[2] The basic purpose of the article was to impose an obligation on watercourse States not to discriminate between their citizens and foreigners when granting access to their courts and tribunals with respect to harm or threat of harm arising out of watercourse activities conducted on their territories. The wording of the original draft had, however, given rise to problems. It would imply, for example, that watercourse States were obliged to allow their citizens and foreigners to have access to their courts and tribunals even in cases where such access was not allowed under their domestic law. The effect of such an interpretation would be that States would have to change their domestic law, which was not the intent of the article. All that was intended was that, where the citizens of a watercourse State had access under the domestic law of that State, foreigners should also have access. The Committee, which had considered cases in which foreigners might be required under some systems of domestic law to post a bond in order to be allowed access to the courts, had not felt that that practice was discriminatory. The article prohibited discrimination on the basis of nationality and residence. The term "judicial and other procedures" included judicial courts and administrative tribunals. Non-discriminatory access, it would be noted, was permitted in the case of appreciable harm and also of a threat thereof.

8. The present formulation, in one rather than two paragraphs, was much simpler and also made it unnecessary to maintain the reference to "watercourse State of origin" in the original text. The title had been changed because the article dealt basically with a non-discrimination requirement and that concept was now more clearly reflected in the wording.

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[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] See 2229th meeting, footnote 3.

9. Lastly, the article had been adopted with the reservation of one, and later a second, member of the Drafting Committee.

10. The CHAIRMAN suggested that a decision on article 33 should be deferred pending a decision on article 32.

It was so agreed.

ARTICLE 32 (Recourse under domestic law) (*continued*)

11. Mr. McCAFFREY (Special Rapporteur) said that, in the light of the discussion held at the previous meeting, he had prepared a revised version of the title and text of the article, which read:

"Article 32. Remedies under domestic law

"A watercourse State shall ensure that compensation or other relief is available for appreciable harm caused in other States by activities within its territory related to an international watercourse to the same extent as for harm caused within its territory by such activities."

The Commission might also wish to consider the addition of the words "in accordance with its legal system" after the word "shall".

12. In the original article, he had endeavoured to follow as closely as possible article 235 of the United Nations Convention on the Law of the Sea, which seemed to have been generally acceptable. The wording of the article had none the less given rise to considerable difficulty. For instance, some members, noting that the article itself dealt with a substantive matter, had felt that the word "recourse" was more procedural in essence than substantive, while other members had not been sure about the effect of the article under existing systems of domestic law. He had therefore departed altogether from the wording of the Convention on the Law of the Sea in an attempt to make the intent of the article clearer. The intent, of course, was that, if a source of harm arose within the borders of a watercourse State but the effect occurred outside those borders, the State in question would be able to ensure that there was no gap in the relief available under its domestic law. In other words, if a person had access under article 33, a remedy would be available: it would be pointless in the event of extraterritorial harm to provide for access but not for a remedy.

13. Mr. BARSEGOV said it had been stated that, if the source of the harm arose on the territory of a watercourse State, that State would give compensation for any harm caused in another country. The crucial question was, however, what precisely the source of the harm was. Was it caused by the activities of the watercourse State itself, which might, for instance, have been negligent in the construction of some building? Or was it caused by a drought that occurred on its territory or by the breaking up of ice with resultant flooding? It was essential to be quite clear about the sources of harm that were contemplated.

14. Mr. BEESLEY said the problem, as he saw it, could be divided into three parts: the first concerned the question of access or recourse, which was seemingly one of process; the second concerned the question of remedy, which was a matter of law for individual States; and the third concerned the question of reparation or compensation, which could be monetary compensation but might also be some form of remedial action. It would be better to follow the precedent of the Convention on the Law of the Sea, which struck the necessary balance; in his view, it was directed at the first point to which he had referred—the process—and could possibly be interpreted as including the second—the remedy—but did not go so far as the third—compensation. For those reasons, he supported the intent of the proposed new version but thought that it might be a little over-ambitious. He would not object to it, however.

15. Mr. NJENGA said that the article in its new formulation was much easier to understand than the original. Its purpose, of course, was to provide that civil remedies would to some extent be available for harm caused to people outside the country that was the source of the harm. For instance, if the source of harm was State A but the effect extended to State B, nationals of State B could, under the terms of the article, have recourse in State A for any resultant harm. To that extent the article was a good one, but it could be improved further by adding the words "in accordance with its legal system", as mentioned by the Special Rapporteur. They would facilitate acceptance of the article by all States since the phrase would enable them to implement the article in accordance with their own civil procedure. Should a State's code of civil procedure not provide for remedies for damage occurring outside its jurisdiction, however, that did not mean that none would be available, for recourse could still be had via the machinery of State responsibility.

16. Mr. GRAEFRATH, endorsing Mr. Beesley's remarks, said that he could not agree to the new provision as drafted. He would, however, be prepared to accept it if the words "in accordance with its legal system" were added after the word "shall" along with the words "recourse for" before "compensation", since it was important to keep the provision at a procedural level. The inclusion of a substantive rule on compensation in a framework agreement would not be acceptable to many States, and it would perhaps be better therefore to stick to the formula of the United Nations Convention on the Law of the Sea.

17. Mr. BARSEGOV said that Mr. Graefrath had made a reasonable proposal and the new provision should be discussed only if the phrase "in accordance with its legal system" was included. The question he had raised earlier should also be clarified, since it was evident that the provision was concerned with activities which could, of course, have various consequences involving liability or responsibility. A further point was what would happen if, say, the ice melted in an Arctic country and flooded a country farther south? Could other States then contend that the Arctic country had failed to do everything possible to prevent flooding in a lower riparian State? Would that situation be covered, bearing in mind that it had been said that both an act and an omission should be taken into account? It was essential to be clear about exactly what was meant by the word "activities".

18. Mr. TOMUSCHAT said that, while he essentially agreed with the new version proposed for article 32, he had reservations about the use of the word "remedy". First, how would that word be translated into French: did it correspond to *un droit* or to *un recours*? Furthermore, it was not clear whether the word "remedy" related to the procedural or substantive aspects of the law. According to the new version, a watercourse State "shall ensure that compensation or other relief is available", wording that involved a claim for compensation and, accordingly, was presumably related to the substantive aspect of the law. Mr. Graefrath had suggested that the words "recourse for" should be inserted in the first line. With the addition of those words, the article would then include both the claim and the procedure for making that claim.

19. Under private international law, the place where the harm occurred was not relevant to any claim for reparation. In article 32, the Commission was confirming that legal principle. However, it was broadening the scope of the principle so that it applied to activities carried out by States. In consequence, caution was in order. In affirming that compensation or other relief must be ensured, the article was leaving the way open for preventive injunctions and other legal actions. In his opinion, the article should be limited to ensuring that compensation was available, rather than compensation or other relief.

20. Mr. BEESLEY said that the issues under discussion had a direct bearing on the topics of international liability and of State responsibility. That interrelationship among the topics should be brought to the attention of the Special Rapporteurs concerned, and should be noted in the commentary.

21. Mr. CALERO RODRIGUES said that the new version of the article clarified the issues involved. He endorsed the idea of adding the words "in accordance with its legal system"; although not absolutely necessary, the phrase could allay fears certain States might have about article 32. He was also in favour of adding the words "recourse for", although doing so might make translation into the other languages more difficult. Article 33 might then become irrelevant because, with the proposed additions, article 32 would encompass both the procedural and substantive aspects of the matter.

22. In his opinion, the issue of ensuring compensation as opposed to compensation or other relief was not an essential one. The main concern of article 32 was that any remedies which applied to harm caused within the territory of a State should apply equally to harm caused outside that territory. Any such remedies would be based on the national legislation of the State concerned.

23. Mr. MAHIOU said that, in elaborating the article, the Commission was simply drawing the logical inferences from article 7 which provided that "Watercourse States shall utilize an international watercourse in such a way as not to cause appreciable harm to other watercourse States". The exact scope of article 32 still had to be determined. In that connection, he fully endorsed the comments by Mr. Beesley and Mr. Graefrath, who had pointed out the merits of basing that article on the United Nations Convention on the Law of the Sea, which, in referring to procedural consequences, established that the States concerned must ensure that recourse was available in accordance with their legal systems. That idea was in fact embodied in article 32, as originally proposed by the Special Rapporteur, and should also be expressed in the new version which, by and large, met with his approval.

24. The Commission should be flexible on the question of providing for compensation alone or for compensation as well as other relief. Compensation was one possibility; however, that did not mean that other possibilities should be excluded. He therefore saw no reason to delete the words "or other relief".

25. Mr. Sreenivasa RAO said that, as a result of the discussion on the new text of article 32, he was more able, in contrast to his earlier position, to accept whatever compromise text the Commission might agree on. At the same time, he believed that the issues raised under article 32 fell within the realm of liability and should be developed under that topic. As it stood, the article did no more than emphasize the obligation to use existing domestic remedies. Actually, it had no real meaning unless it established that, in so far as existing remedies were inadequate, States should provide remedies, either by amending existing legislation or enacting new laws. Yet that would cause difficulties for States which did not envisage such possibilities.

26. Of more concern was the fact that the article might be taken to mean that private individuals had the right to interfere in matters which primarily concerned inter-State relations. For example, in the case of a negotiated agreement between two States concerning management of a watercourse system, private individuals might use legal means to block implementation, even though the agreement had been concluded between States in the interests of large sections of the population. He was certainly not opposed to the basic principle that every individual, whether a national or a foreigner, should have the same rights in regard to a State's legal system. The idea was one to which all democratic countries subscribed. He was merely pointing out that the article seemed not to be addressing other more important aspects, such as cooperation between States.

27. Mr. TOMUSCHAT said that articles 33 and 32 were both concerned with non-discrimination. Article 33 prohibited States from discriminating on the basis of nationality or residence in granting access to judicial or other procedures. The new version of article 32 specified that States, in granting access to judicial and other procedures, should not discriminate on the basis of the place where the harm had occurred. As it was currently being interpreted, the article cast the issue of non-discrimination in a slightly different light, implying that appropriate remedies should be provided if they were not already available under existing legislation. That aspect of the article should be made more explicit.

28. Mr. EIRIKSSON said that he agreed with the observations of Mr. Tomuschat on the link between articles 32 and 33. Furthermore, he personally thought that the article of the United Nations Convention on the Law of the Sea on which article 32 was based had sought to establish the requirement that States, if they had not already done so, should provide for the possibility of suing for environmental damage. Accordingly, the wide scope

of article 32 as originally proposed had never been a matter of concern. At the present stage in the debate, article 32 seemed to deal essentially with equality of treatment as between harm caused inside and outside the territory of a State, while article 33 dealt with equality of treatment as between nationals and non-nationals. He could accept those two articles as they were currently being interpreted, but a more narrow interpretation would be unacceptable.

29. Mr. NJENGA said that there was really no need for two articles on non-discrimination. With the addition of the words "in accordance with its legal system", the new version of article 32 would adequately cover the entire issue, thus making article 33 irrelevant.

30. Mr. DÍAZ GONZÁLEZ pointed out that he had entered a general reservation in regard to the draft articles. As far as article 32 was concerned, he wished to draw attention in the first place to the need to correct the Spanish version. In particular, the term *remedio* was never used in Spanish legal terminology; the proper term was *recurso*.

31. He could not agree with the formula in the new version of article 32 to the effect that a watercourse State had an obligation to ensure that compensation was available for appreciable harm, a form of words which appeared to suggest that the watercourse State would have to set up a fund from which compensation would be paid in such cases. That could not be the intention of article 32, the purpose of which was to ensure that there should be no denial of justice and that a judicial remedy should exist for the benefit of the victim of appreciable extraterritorial harm.

32. The CHAIRMAN, speaking as a member of the Commission, said he was opposed to the new version of the article, which represented a step backwards. The Commission had formulated a set of draft articles to reflect the rules of international law on the subject. Article 32 bypassed that body of international law and entered into the realm of domestic law. The present draft was concerned with the relations between States, not with the relations between a State and private individuals under domestic law.

33. The intention of the Special Rapporteur had been to frame a rule based on the result of the *Trail Smelter*[3] arbitration. The text now proposed went beyond that particular precedent. In that instance, the two countries concerned, the United States of America and Canada, had had to enter into a special agreement to deal with claims by United States citizens who had no appropriate remedies under Canadian law. The United States had had to take up the claim against Canada. The case was one of State responsibility.

34. In the case envisaged under article 32, remedies under domestic law had to be available for the victim of appreciable extraterritorial harm and he could not accept that approach, since a body of international law was being framed on the subject. It would be going too far to suggest, as article 32 appeared to indicate, that the State was responsible for ensuring compensation was available to the victim of appreciable harm, something which would seem to imply a subsidiary responsibility on the part of the State in the event, for example, of the operator responsible for the harm being unable to pay compensation because of bankruptcy. In the *Trail Smelter* case, more than compensation had been at stake. The company responsible for the harm had also been asked to put an end to the pollution.

35. As he saw it, the victim of the appreciable harm should be able to have recourse to judicial process for compensation or relief in accordance with the legal system of the State concerned. The wording of article 32 should make that position clear.

36. Mr. FRANCIS said that he would have found it difficult to accept the version proposed for article 32, in particular the very rigid notion of compensation it embodied, but that defect was largely remedied by introducing the words "in accordance with its legal system". The watercourse State should be required to make a recourse available to the victim of appreciable harm, so that the victim could institute legal proceedings. With the changes proposed by Mr. Njenga and Mr. Graefrath, article 32 should be acceptable and there was no need to defer a decision on it.

37. Mr. PAWLAK (Chairman of the Drafting Committee) proposed that a small informal group should be set up to prepare a combined text for articles 32 and 33 during a recess.

38. Mr. McCAFFREY (Special Rapporteur) said he believed that both article 32 and article 33 were necessary, one being substantive and the other procedural. The question had been raised of omissions, in connection with such events as floods. His own intention had been to cover only human activities that caused harm in another State.

39. With reference to a point raised by Mr. Tomuschat, if the domestic legislation of the State concerned provided remedies for the victims of appreciable harm within the State, the provisions of article 32 would require it to make the same remedies available to victims of appreciable harm outside the country. Its laws would have to be changed to arrive at that result. If, on the other hand, no such remedies were available to victims of appreciable harm within the country, the State would not be under any obligation to make them available for extraterritorial harm.

40. In the *Trail Smelter* case, the position had been that the victims in the United States had had no recourse or remedy in Canadian law because of a rule in English common law—valid in Canada—to the effect that an action for damage to land could only be brought in the courts of the place where the land was located. Consequently, the victims had had to ask the United States Government to take up their claim since they had exhausted local remedies, which was of course a requirement under the law of diplomatic protection. Article 32 did not mean that the State concerned had to set up a special fund to ensure compensation. The State was only required to make the possibility of compensation available, i.e. ensure the existence of legal recourse.

[3] See 2222nd meeting, footnote 7.

41. The article was not intended to bypass the rules set out in the other articles but to try to keep disputes from escalating into inter-State conflicts when they could be easily solved through judicial proceedings.

42. The debate had revealed differences in views regarding article 32 and the Commission needed more time to thrash out those differences. In the circumstances, he suggested that the article should not be included in the draft adopted on first reading, but kept for the second reading. A short paragraph on the subject could also be included in the report. In that way, the Commission might perhaps arrive at an article which all the members could understand.

43. Lastly, article 33 should have a place in the draft, since it laid down the non-controversial rule that the State should not discriminate.

44. Mr. EIRIKSSON said that, further to the clear explanations by the Special Rapporteur, he was more comfortable with article 32. As to the wording, he agreed that the proper term to use was "recourse". He would suggest that articles 32 and 33 should be included in the draft between square brackets in order to invite the views of Governments.

45. Mr. ARANGIO-RUIZ said that, following the suggestion to merge articles 32 and 33, it should be possible to devise wording to specify that the rule of non-discrimination applied not only to judicial proceedings but also to substance, namely to compensation, which was the subject-matter of both articles.

46. Mr. TOMUSCHAT said he was opposed to the suggestion to merge articles 32 and 33, for a merger would only combine all of the difficulties which were inherent in those two provisions. Special care should be taken with the French version of article 33, which should be prepared at the same time as the English version.

47. The CHAIRMAN, speaking as a member of the Commission, said that the question of access was particularly important for the plaintiff.

48. Speaking as Chairman, he invited the Commission to go into recess to enable a small informal group to work out a new text for articles 32 and 33.

The meeting was suspended at 11.40 a.m. and resumed at 12.35 p.m.

49. Mr. PAWLAK (Chairman of the Drafting Committee) said that the small informal group had examined the possibility of revising article 32 but had decided to prepare a new text which combined articles 32 and 33 and which read:

"Article 32. Non-discrimination

"Watercourse States shall not discriminate on the basis of nationality or residence:

"(*a*) in ensuring that compensation or other relief is available for appreciable harm caused to other States by activities within their territories related to an international watercourse to the same extent as for harm caused within their territories by such activities;

"(*b*) granting access to judicial or other procedures to any natural or juridical person who has suffered appreciable harm as a result of an activity related to an international watercourse or is exposed to a threat thereof."

50. In the proposed new text, subparagraph (*a*) dealt with non-discrimination with regard to access to compensation and reflected the contents of the former article 32. Subparagraph (*b*) dealt with non-discrimination with regard to access to judicial and other procedures and embodied the contents of the former article 33.

51. Mr. CALERO RODRIGUES said that, despite their efforts, for which he was grateful, the members of the informal group had not succeeded in producing a satisfactory text. The wording of the new article contained many of the earlier ambiguities, and was not at all clear. He would have been prepared to accept article 32 as revised and as further amended during the discussion, but he could not accept the new text, which merged articles 32 and 33. He suggested that article 32 should be approved in its amended form and that both article 32 and article 33 should be placed in square brackets.

52. Mr. RAZAFINDRALAMBO said he agreed with the suggestion by Mr. Calero Rodrigues, although he was not, *a priori*, opposed to the new article 32. There was a difference between the article's two provisions in that subparagraph (*a*) referred to the right to compensation in the event of appreciable harm being caused, while subparagraph (*b*) dealt with the principle of access to judicial procedures. That difference explained why the last words "or is exposed to a threat thereof" appeared in subparagraph (*b*) and not in subparagraph (*a*). As a matter of drafting, he suggested that the last part of subparagraph (*b*) "as a result . . . threat thereof" should be deleted.

53. Mr. SOLARI TUDELA said he had misgivings about the new formulation. The reference in subparagraph (*a*) to compensation being made available for appreciable harm would appear to impose on the watercourse State an international obligation to set up a fund to guarantee payment of the compensation. The new text obviously went much beyond the framework agreement under consideration.

54. The phrase "in accordance with their legal systems", which formed part of the original text of article 33, was no longer found in subparagraph (*b*). It was fundamental and he could not accept its elimination. He proposed that article 32 should be left aside for the time being, as had indeed been suggested by the Special Rapporteur, and article 33 should be retained in the draft.

55. Mr. HAYES said he understood that, in the new version of article 32, subparagraph (*a*) replaced article 32 itself and subparagraph (*b*) replaced article 33. The effect of the two articles, as they had stood previously, was to remove the obstacle to non-nationals obtaining access to the courts to present their claims on an equal footing with nationals. The same remedies were, moreover, to be provided for harm caused both outside and inside the State where the activity took place. The new text was likewise based on the principle of non-discrimination. However, subparagraph (*a*) of the new

text did not convey the same meaning as article 32 in the version presented by the Special Rapporteur. In combination with the *chapeau*, its effect was to prohibit discrimination on the basis of nationality or residence in respect of harm occurring outside the watercourse State. However, a State could comply with the new article 32 by providing no remedy at all for harm occurring outside it, if none was available to its own nationals. Certainly, that would be non-discrimination in the literal sense, but it would not be very helpful to non-nationals, who were more likely to be affected. If the Commission now decided to abandon the original article 32, he did not consider that subparagraph (*a*) of the new draft would be a satisfactory substitute.

56. Mr. Sreenivasa RAO said he agreed with Mr. Calero Rodrigues that, instead of adopting the new draft article 32, the two previous drafts should be adopted together with the amendments proposed, and placed in square brackets. There was no disagreement on the principle of compensation, although the harm itself was not defined: it could consist of environmental or industrial damage, personal injury, loss of property, forfeiture of a private right, among other things, and as yet there was no agreement on a common threshold. The real problems of compensation began only at the stage of implementation. Those difficulties were the stuff of inter-State relations, and there was no need for private remedies to be included. In some cases, the State concerned would be unable to provide compensation, even if it was willing to do so. The draft ignored all the difficulties associated with compensation, including the issue of liability. Those problems could not be resolved in a single text.

57. Mr. ARANGIO-RUIZ supported the solution proposed by Mr. Calero Rodrigues.

58. Mr. NJENGA suggested that the Commission, instead of placing the two articles in square brackets, should insert a footnote in its report stating that they had not received the full endorsement of the Commission, and that further discussion was needed in the Sixth Committee.

59. Mr. SHI said the new text offered no real improvement and might even make matters worse. At the Commission's forty-second session, he had commended the efforts of the Special Rapporteur to avoid politicizing disputes concerning harm caused to individuals or juridical persons; but he had also warned that the two draft articles would be very difficult for some States to accept, and it would be best to present them in the form of an optional protocol.[4] He now felt that the best solution would be to delete them altogether. However, he could agree to the proposal of Mr. Calero Rodrigues, if it commanded general support.

60. Mr. EIRIKSSON said he had no objection to either of the two articles, or to the proposed merger. As a solution to the present impasse, however, he could willingly agree to both articles being placed in square brackets.

61. Mr. BEESLEY urged that the two articles should be kept separate. The new text would lead to a kind of internal discrimination, since it gave access to the courts in cases of appreciable harm, or risk of harm, but provided compensation only for the former. Certain situations might fall between the two stools. The Commission should perhaps allow itself some time for reflection before making a decision.

62. Mr. TOMUSCHAT said it would be best to place the earlier versions of article 32, as amended, and of article 33, in square brackets. It was the only practicable solution, short of abandoning both articles, which would be regrettable. He was not satisfied with the new draft, which had given rise to misunderstandings; it was not correct, as Mr. Solari Tudela had implied, that States would have a subsidiary duty to compensate for harm caused.

63. Mr. BARSEGOV said that the draft produced by the informal group illustrated the complexity of the subject. However, it also ran counter to the thrust of the draft articles, and tended to undermine the Commission's previous work on the topic. States should themselves be invited to consider the problems associated with articles 32 and 33, which should therefore be placed in square brackets in the Commission's report.

64. Mr. SEPÚLVEDA GUTIÉRREZ said he could not accept the informal group's text. Moreover, article 32 had already led to serious reservations in its previous form. He agreed with the solution proposed by Mr. Calero Rodrigues.

65. Mr. MAHIOU said he shared that view. No satisfactory compromise text had yet emerged; indeed, it was not yet clear whether it was possible to combine articles 32 and 33.

66. Mr. CALERO RODRIGUES suggested another solution: to refer the two articles back to the Drafting Committee.

67. Mr. PAWLAK (Chairman of the Drafting Committee) suggested that the two articles could be taken up by the Drafting Committee when the rest of the Committee's work was completed. If the Commission was unable to accept it, article 32 should be abandoned and a paragraph should be included in the report reflecting the discussion on the article and the differences of view that had emerged. He noted that no fundamental objections had been voiced in connection with article 33.

68. Mr. Sreenivasa RAO said that, in view of the limited time available, the only realistic solution was to put both texts in square brackets, incorporating in the report the suggestions made about courses of action under domestic law.

69. Mr. CALERO RODRIGUES, speaking on a point of order, withdrew his suggestion to refer the texts back to the Drafting Committee.

70. Mr. BARSEGOV said that it would be useful to refer the texts, in square brackets, to the Sixth Committee, with a full explanation of the difficulties. Governments could then assist in solving the complex problems involved.

[4] See *Yearbook ... 1990*, vol. I, 2164th meeting, para. 45.

71. Mr. TOMUSCHAT said that, since the Special Rapporteur would have to reply fully to the points raised, the debate should be adjourned until the next meeting.

72. Mr. BARSEGOV supported that proposal, adding that the Commission could continue its discussion later in the day.

73. The CHAIRMAN suggested that the discussion should be held over until the next meeting.

It was so agreed.

The meeting rose at 1.20 p.m.

2231st MEETING

Thursday, 27 June 1991, at 10.10 a.m.

Chairman: Mr. Abdul G. KOROMA

Present: Mr. Al-Qaysi, Mr. Arangio-Ruiz, Mr. Barsegov, Mr. Beesley, Mr. Calero Rodrigues, Mr. Díaz González, Mr. Eiriksson, Mr. Francis, Mr. Graefrath, Mr. Hayes, Mr. Mahiou, Mr. McCaffrey, Mr. Njenga, Mr. Ogiso, Mr. Pawlak, Mr. Pellet, Mr. Sreenivasa Rao, Mr. Razafindralambo, Mr. Roucounas, Mr. Sepúlveda Gutiérrez, Mr. Shi, Mr. Solari Tudela, Mr. Thiam, Mr. Tomuschat.

The law of the non-navigational uses of international watercourses (*continued*) (A/CN.4/436,[1] A/CN.4/L.456, sect. D, A/CN.4/L.458 and Corr.1 and Add.1, ILC(XLIII)/Conf.Room Doc.2)

[Agenda item 5]

DRAFT ARTICLES PROPOSED BY THE DRAFTING COMMITTEE (*continued*)

1. The CHAIRMAN, recalling that, at the previous meeting, article 32 had been left pending, since no agreement had been reached despite an extensive debate, suggested that the Commission should deal first with article 33, which had already been introduced by the Chairman of the Drafting Committee.[2]

ARTICLE 33 (Non-discrimination) (*concluded*)

2. Mr. PAWLAK (Chairman of the Drafting Committee) said that the basic purpose of the article was to oblige watercourse States not to discriminate between their own citizens and foreigners in granting access to their courts in respect of harm or threat of harm arising from watercourse activities carried out in their territories. In that connection, the Drafting Committee did not consider that the practice in the domestic law of some countries of requiring foreigners to post a bond in order to be given access to the courts was discriminatory. The article merely prohibited discrimination on the basis of nationality or residence. The wording adopted by the Committee was much simpler than that of article 4 (Equal right of access) which had been proposed by the Special Rapporteur in the annex to his sixth report.[3] Article 33 now consisted of only one paragraph and the reference to "the watercourse State of origin" had been omitted.

3. Article 33 had been adopted by the Drafting Committee with a reservation by one of its members, but it had not been placed in square brackets.

4. Mr. McCAFFREY (Special Rapporteur) said it was clearly understood that watercourse States were required to grant nationals or residents of other States access to judicial procedures only where such access was provided for their own nationals. There was no question of requiring them to amend their internal law to enable individuals from other countries to obtain easier access to their courts.

5. The principle of non-discrimination, which was already part of State practice, had been formally enshrined in almost all modern-day instruments adopted in the environmental field. For instance, article 2, paragraph 6, of the Convention on Environmental Impact Assessment in a Transboundary Context, adopted in 1991 by ECE, stipulated that:

> The Party of origin shall provide ... an opportunity to the public ... to participate in relevant environmental impact assessment procedures ... and shall ensure that the opportunity provided to the public of the affected party is equivalent to that provided to the public of the Party of origin.

Another example was to be found in the Guidelines on responsibility and liability regarding transboundary water pollution, which had also been prepared by ECE and which provided that victims of pollution had the right to institute proceedings in the competent courts of the place where the harm had occurred.[4] The Protocol on Liability and Compensation for Damage Resulting from the Transboundary Movements and Disposal of Hazardous Wastes and Other Wastes, which was currently under consideration and would be annexed to the Basel Convention on the same subject, also provided for equal access to the courts of the State of origin.

6. The basic idea contained in article 33 should not prove too controversial.

7. Mr. SHI said that it would certainly be a valuable achievement if the Commission could adopt article 33 on first reading. In a spirit of cooperation, he would therefore withdraw the proposal he had made at the 2230th meeting that the article should be deleted altogether. He was willing to accept it as it was.

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[1] Reproduced in *Yearbook ... 1991*, vol. II (Part One).

[2] For text, see 2230th meeting, para. 6.

[3] See 2229th meeting, footnote 3.

[4] See document ENVWA/R.45, annex.